

## **MINUTES**

### **MONTANA SENATE 57th LEGISLATURE - REGULAR SESSION CONFERENCE COMMITTEE ON HOUSE AMENDMENTS TO SENATE BILL 429**

**Call to Order:** By **CHAIRMAN KEN MILLER**, on April 11, 2001 at 8:00 A.M., in Room 350 Capitol.

#### **ROLL CALL**

**Members Present:**

Sen. Ken Miller, Chairman (R)  
Rep. Daniel Fuchs, Chairman (R)  
Rep. Gary Forrester (D)  
Rep. Dennis Himmelberger (R)  
Sen. Mike Sprague (R)  
Sen. Jon Tester (D)

**Members Excused:** None.

**Members Absent:** None.

**Staff Present:** Marion Mood, Secretary  
Eddy McClure, Legislative Branch

**Please Note:** These are summary minutes. Testimony and discussion are paraphrased and condensed.

**Committee Business Summary:**

Hearing(s) & Date(s) Posted:  
Executive Action: SB 429

#### **EXECUTIVE ACTION ON SB 429**

**CHAIRMAN KEN MILLER** asked the bill's sponsor, **SEN. MIKE SPRAGUE**, to open the discussion on SB 429 with a brief history, and then outlining possible changes.

**SEN. SPRAGUE** submitted **EXHIBIT(ccs82sb0429a01)**, Ordinance No. 00-5133, saying at issue was the City of Billings trying to make a franchise fee retro-active and the residents claiming this required the vote of the people; hence the petition. The

original time frame was thirty days, but legal opinion was that the allotted time started with the application of the petition; this resulted in the first 21 days being spent preparing the petition and getting approval, leaving the petitioners nine days in which to collect the required number of signatures. He stated that the proper number was raised but that some were from outside the city of Billings, an area he referred to as the "doughnut" area, resulting in a large amount of non-city residents' signatures who also were affected by the utility right-of-way fee the city was charging but were not considered residents for purposes of the petition; in all, about 15,000 signatures were collected in 15 days which was necessary for the issue to get on the ballot. The conference committee was called because of the House striking the retro-activity which was the basis of SB 429 and was legal according to Counsel **Greg Petesch, Legislative Branch**. He also objected to the House's other amendment, substituting 60 days for his original 51, saying this might solve future problems but did nothing for this specific case. According to the mayor, the city council would not commit to saying they would impose the right-of-way fee, and he would not say that they would not, so now the case was in court where it will be decided what fee would be charged. In all possibility, this would be a 4% royalty on gross revenue generated from all assets lying underground. **CHAIRMAN MILLER** felt the main concern was the retro-activity, and not the 60 days, and he called on **Brent Brooks, Billings City Attorney**, to explain this issue. **Mr. Brooks** stated that they did not have a problem with being told that the city could not impose the right-of-way rental fees from the enactment of this ordinance until the vote in November, but he felt that if Section (3) was added back in, it would make the ordinance ineffective and unenforceable. **CHAIRMAN MILLER** referred to Section (1) of the ordinance which repealed 7-1401, 1402, and 1403, and asked what that meant, thinking that there must have been a prior ordinance that took care of some of these issues. **Mr. Brooks** replied this was partially true; one of the purposes of this ordinance was to have everything possible combined in it so it would be clear how the utility issues would be managed.

**SEN. JON TESTER** asked how the city controlled who was in their right-of-way before. **Mr. Brooks** answered that they had regulations and information spread out, and this ordinance was an attempt to consolidate and streamline. **SEN. TESTER** asked if they were repealing any fees with the ordinance as well. **Mr. Brooks** did not think so.

**SEN. SPRAGUE** concurred, saying that there had been another ordinance and they had been managing the utilities and right-of-way fees so this was nothing new. This ordinance was going to be

voted on in its entirety by the people in November, and not whether to accept only parts of it. Because this issue was so complex, he asked **Chris Gallus, Attorney**, for his comments.

**Chris Gallus** claimed that what was being sought was a stipulation from the City of Billings that the fees would not be collected. He asserted that he had not been involved in the settlement negotiations and thus did not know why an agreement had not been reached. He felt that if the city committed to a self-imposed stipulation now, the conference committee process could be avoided.

**SEN. SPRAGUE** reiterated that with this ordinance, the city made the enactment of these fees to be within 30 days; the people started the petition, and now the ordinance in its totality would be voted on. He requested that the ordinance not be enacted because of the fee implication, and he questioned if a 4% fee was proper.

**REP. DENNIS HIMMELBERGER** asked whether the whole ordinance would be on the ballot. **Brent Brooks** confirmed this, adding that between now and November, they would need its provisions to manage who was in a right-of-way and their activities; if Section (3) was added back in, it would make the ordinance ineffective until then, and they would have to find a different way of managing the right-of way expeditiously because construction season was upon them. **REP. HIMMELBERGER** asked if the existing ordinance dealing with right-of-way fees was not adequate in the interim. **Mr. Brooks** affirmed it was not because there had been a huge demand for construction work, and that was the main reason for enactment of the ordinance in question; they had to be able to keep track and coordinate projects. Lastly, he stated that putting the fee issue to the vote of the people was not their main concern, gutting the entire ordinance in the interim was.

**VICE CHAIRMAN DANIEL FUCHS** referred to the sponsor's claim that **Greg Petesch** had approved SB 429 in its original form, and charged that the retro-activity amendment was put on by **REP. MARK NOENNIG** because of testimony from Mayor Tooley. **Mr. Brooks** asserted he could not speak for his motive but heard that the mayor implied to the House committee that the council had no desire to implement it at this time nor would they put it in writing. **VICE CHAIRMAN FUCHS** wondered why this could not be put in writing since that would eliminate the need for Section (3). **Mr. Brooks** agreed this could be requested from the City Administrator, adding that it was obvious that the collection of rental fees had not been implemented; he repeated that this was being litigated, but that the other provisions in the ordinance were of concern because they allowed them to manage the right-of-ways. **REP. FUCHS** was adamant about having a concession in

writing to be assured that the city would not charge those fees.

**Mr. Brooks** claimed they had left a message with the mayor, and again asserted that they had kept their word and not yet taken action with collecting the fees. **VICE CHAIRMAN FUCHS** told him he appreciated that but that the days of the handshake had passed.

**Jani McCall** stepped forward and repeated that they were expecting a response from Billings shortly.

**SEN. TESTER** wondered if ordinances typically were left to the vote of the people, and **Mr. Brooks** denied that.

**SEN. SPRAGUE** felt the answers were not forthcoming; the request had been made and all the committee had gotten were word games. He stated it was as if they were not going to make a statement because it would weaken their court case. He knew that cities could enact ordinances but felt strongly that they could not enact a tax without a vote of the people; and this particular ordinance imposed a 4% royalty tax on schools, hospitals, and government and that was the reason for the uproar.

**SEN. TESTER** asked if Section (3) could be amended to make the retro-activity applicable to the fees. **Eddye McClure, Legislative Branch**, replied that any of the language in the amendment could be changed except for a severability clause.

**SEN. TESTER's** intent was to make the ordinance retro-active but to disallow the collecting of fees. **Ms. McClure** felt this was possible. **SEN. SPRAGUE** stated he had heard that the City of Billings could not impose an ordinance or regulate their right-of-ways if this bill passed. He surmised that this bill then would put them back to where there were before this ordinance but by the same token, it had been business as usual with them putting in and managing right-of-ways, and charging fees to companies opening roads to do underground work and filling them in again. He was not sure why they claimed this bill would shut them down. **Ms. McClure** explained that the problem was that it was all in one big document, and the tax was within the ordinance and could not be separated out.

**SEN. TESTER** wanted to segregate the fee issue so the city could go on with their ordinance. **SEN. SPRAGUE** reminded him that the bill said "do not implement", but that the power companies have been told to implement a plan without guidelines from the ordinance, hence the litigation, and he felt that without this bill, they would be implementing.

**CHAIRMAN MILLER** wanted know how long it took to adopt an ordinance. **Mr. Brooks** said it would be a minimum of 60 days; there were two readings, one public hearing, and 30 days upon

final passage before it became effective. **CHAIRMAN MILLER** stated that the committee had two options, to either get a commitment in writing or to modify the retro-activity clause to where it only included the fees. He preferred the letter but wanted it today, and it had to state that no fees would be collected before it was voted on and that they would not be collected retro-actively once the ordinance was approved by the voters. **SEN. TESTER** questioned the likelihood of receiving such a letter; he was not inclined to hold up the process for something that might never come. **Jani McCall** did not want to take a position on this and deferred to **Mr. Brooks** who assured the committee that e-mails and voice-mails had been sent to the administrator.

**Ms. McClure** offered to check with legal counsel to see if the bill could be narrowed down to Section 7-1411 of the ordinance.

**REP. HIMMELBERGER** reminded **Jani McCall** of an earlier conversation, and she stated she had not gotten an answer yet.

**SEN. SPRAGUE** requested of **Ms. McClure** to check if the inference was correct that with the retro-activity left in the bill, the cities would be hamstrung in regulating their right-of-way as had been testified.

**VICE CHAIRMAN FUCHS** objected to the committee's deliberations being delayed despite the fact that the city representatives had known when this meeting was to take place, and suggested to move forward and resolve this in a free conference committee if the letter was to arrive and was rejected. **CHAIRMAN MILLER** thought the staffer needed some more time to draft the amendment but agreed to go ahead if the letter had not arrived by the time the committee reconvened at 1:30 p.m.

**SEN. SPRAGUE** cautioned that the city would only do what they had to do and when, and agreed to set a deadline to see if they were serious.

**CHAIRMAN MILLER** adjourned the meeting at 8:30 a.m.

*{Tape : 1; Side : B}*

**Note:** The Conference Committee reconvened at 1:30 p.m. in Room 350 Capitol.

**Eddy McClure** reiterated that the question put to her had been whether this could be narrowed down, and explained that the retro-activity had been written as general as possible, even though it was geared towards Billings. She reminded the committee that Article 5 of the Constitution prohibited the legislature to write special legislation, and if she narrowed it

down, it would give the City of Billings grounds to challenge the whole statute, and charged the retro-activity had to be left in as is or taken out. **CHAIRMAN MILLER** submitted

**EXHIBIT (ccs82sb0429a02)**, an agreement by the parties, and informed the committee that the judge in Billings had met with the plaintiffs and the defendants. **Ms. McClure** felt that crucial to this discussion was, on page 2, line 1, the stipulation that the city would not collect the franchise fees prior to the election; it would allow the city to do the management part of the ordinance. **CHAIRMAN MILLER** explained this was binding even though it had not yet been signed.

**SEN. SPRAGUE** felt that as long as this agreement was in place, the voters would be safe. He thought, though, that there were still some issues because the ordinance implied that permission had to be given prior to excavating, and knew that the utilities had problems when faced with an emergency situation that needed to be fixed without having the luxury of waiting for a permit.

**SEN. TESTER** addressed the same problem, stating it would be poor business for the city if a utility could not fix a broken line without having notified City Hall. **Mr. Brooks** dispelled that claim, saying that emergency repairs were being done and the work permit would be applied for retro-actively. He also pointed out that this agreement would be signed at 2:45 p.m. today.

**SEN. SPRAGUE** commented that **Mr. Brooks** was present at the council meeting with the plaintiffs, and that they had voiced concern they might get sued if they did work without a permit. **Mr. Brooks** assured him that this issue would be codified in the rules. **SEN. SPRAGUE** wondered if the fees were not collected, what if the city was successful at the ballot, would there be retro-activity to the original January date. **Mr. Brooks** was not sure if the City Council would do that but they would have the legal right. **SEN. SPRAGUE** stated again that by this agreement, the City of Billings would not collect the fees, and he wondered if he could indeed tell his constituents that this would not be retro-active someday. **Eddye McClure** stated it said "prior to this date" which meant they could not do it prior to November 6, but it did not say they could not go backwards once the election was over. **Chris Gallus** clarified that the language was specific to the fee and not the effective date, and he concurred with **Ms. McClure** that they might come back. **SEN. SPRAGUE** reminded him that the parties involved had already agreed to this language; he did not see how this committee could get involved. **Chris Gallus** maintained that neither of the parties had signed the document yet, and it could be discussed further. **SEN. SPRAGUE** wondered if the committee added the retro-activity, would this clarify that

it did apply or would it nullify the whole ordinance. **Chris Gallus** agreed that it would destroy the agreement because the parties involved wanted the non-fee portion of the ordinance left in effect.

**CHAIRMAN MILLER** charged that the answer to this would be that the language on the ballot include the date this was to take place. **Mr. Brooks** informed him that the ballot language was already set. **CHAIRMAN MILLER** wanted to hear how it was worded. **Mr. Brooks** replied that retro-activity only applied to the ordinance as sustained and approved by the voters; if the voters disapproved and repealed the ordinance, the fees could not be collected retro-actively. **CHAIRMAN MILLER** wondered if the voters knew it could affect them back to January.

**VICE CHAIRMAN FUCHS** questioned if this stipulated agreement could be tweaked; it was not signed yet but was reached with the assistance of the judge. **Mr. Brooks** was sure the judge would not appreciate any changes.

**SEN. SPRAGUE** stated that he appreciated that the parties had reached an agreement but stated that the voters sought to stop the ordinance from being implemented, and merely had nine days to circulate their petition, and this brought it back to the original bill. Not only were the people denied the full 30 days to collect signatures, but later, a number of the signatures were declared invalid; if this had not happened, they would have stopped this ordinance until election day, but they were not successful by a couple of days while the 21-day delay was being sorted out. **CHAIRMAN MILLER** felt the committee accomplished what they had wanted to with the agreement. He reasoned that it would be up to those opposing the ordinance to make people aware that it went back to October 1, 2000 unless the City decided otherwise, meaning they would have the right to collect the fees retro-actively. He was not sure he wanted to put Section (3) back in the bill. **SEN. SPRAGUE** said his goal was to get a consensus by throwing out different views.

**CHAIRMAN MILLER** suggested making a motion to accept the bill with the House amendments which took out the applicability and changed the time frame to 60 days. **SEN. SPRAGUE** wondered if that meant that the members approved of it not being retro-active which he could not support because his concern was that it could not be explained to the folks back home, and he did not want it known that the committee had voted it down. **CHAIRMAN MILLER** felt an account of the agreement would be in the paper. **Ms. McClure** suggested it could be mentioned during the floor debate. **REP. GARY FORRESTER** agreed with **SEN. SPRAGUE** that this had some standing in the court, and he believed that the City of Billings

would not collect these fees prior to November 6, 2001. Since they had signed off on this stipulation, they had no wiggle room, and if they were to collect retro-actively, it would have consequences with regards to their court case.

**VICE CHAIRMAN FUCHS** asked what the legalities were if they would go back and collect from October 1, 2000 with the ordinance being approved in November; he feared that would leave them open to litigation. **Mr. Brooks** thought that if the voters approved the ordinance, it would be effective back to November 23, 2000.

**SEN. SPRAGUE** felt it would be fair to have the ordinance be effective on election day of this year, if approved, and not collect for a year's worth of services. **Mr. Brooks** reminded him that the ordinance was in effect right now, but the city had chosen not to enforce some of its provisions. **SEN. SPRAGUE** accused the city of not doing so because of the pending litigation. **Mr. Brooks** contradicted him, saying they had not collected any fees before this became an issue; he added that they had done precisely what they were asked to, with regards to the letter of agreement. **CHAIRMAN MILLER** stated that the language was misleading; it should have said "will not enforce and collect". **Chris Gallus** thought it could say "that we will not collect prior to November 6, 2001"; what he heard from the city was that they would not enforce, and that was a different issue. He suggested the committee should have clarification from the city. **CHAIRMAN MILLER** was not sure the legislature should get into that argument, it should be between the city and its residents; all they wanted was to make sure there was a vote on the ordinance, and they had accomplished that. **VICE CHAIRMAN FUCHS** reiterated that the committee would recommend to the City Council that this ordinance was enforced, and if approved by the voters, they would have the right to collect the fees going back to November 2000. **Mr. Brooks** agreed they could do that conceptually.

**REP. FORRESTER** wanted the language to read: "the City of Billings will not collect the franchise fee prior to November 6, 2001" and asked where they read that the ordinance was in effect and the city could go back and collect the fees. **Mr. Brooks** repeated because the ordinance was in effect now. **REP. FORRESTER** still did not see how this could be read into the wording. **SEN. SPRAGUE** did not think the voters would approve this, but if they did, he wanted them to know that this could not only go forward but they could also be paying in arrears, in short, he wanted an ironclad answer.

**Motion/Vote:** **SEN. SPRAGUE MOVED** to put back the retro-activity.



**Discussion:**

**VICE CHAIRMAN FUCHS** suggested a substitute motion that the committee did not concur with the House amendments, and then it could be resolved in a Free Conference Committee. **SEN. SPRAGUE** stated he tried to be as trusting as the rest of the committee but nothing would keep the city from breaking their promise if they were successful in their court case, and he knew that the people at home wanted the retro-activity back so it would not come back to haunt them; he wanted to go on record to keep that clause in case it reared its head.

**REP. FORRESTER** asked **Gary Wiens, Yellowstone Valley Electric Cooperative** who was one of the plaintiffs, to comment on this. **Gary Wiens** stated that the cooperatives assets ran through the town and while only the town can vote on it, it did have consequences to their customers.

*{Tape : 2; Side : A}*

**Vote: Motion** to put back retro-activity **failed**, with **Sens. Miller and Tester** voting no, and **Reps. Himmelberger and Forrester** voting no.

**Motion/Vote: CHAIRMAN MILLER MOVED** to **ACCEPT** the House amendment.

**Discussion:**

**SEN. SPRAGUE** commented that throughout all the meetings, the City of Billings had not been forthcoming; they never said they would not collect the fees prior to November 6, 2001, only that they had no strong urge to do so, and all the agreement did, as per Exhibit (2), was to leave out the word "retro-actively".

**CHAIRMAN MILLER** thought this was open to interpretation, some members of the committee were reading it differently.

**SEN. TESTER** commented he would accept it as written, believing there would be no fees collected prior to November 2001.

**REP. HIMMELBERGER** agreed there was some confusion with the wording but he was inclined to be trusting. He also felt good that this would go on the ballot, and the voters would know what they were voting for.

**REP. FORRESTER** claimed that in past dealings with City of Billings, he felt they had always acted in good faith; if they went against the agreement as perceived, it would forever damage trust in Billings and other municipalities.

**SEN. SPRAGUE** stated he was glad these deliberations were on tape because all he had wanted was fairness and a straight answer to a straight question.

**REP. FUCHS** concurred.

**Vote:** Motion carried with **SENS. MILLER and TESTER** voting aye, and **REPS. HIMMELBERGER and FORRESTER** voting aye.

**ADJOURNMENT**

Adjournment: 1:30 P.M.

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SEN. KEN MILLER, Chairman

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MARION MOOD, Secretary

KM/MM

**EXHIBIT** (ccs82sb0429aad)